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THE MODERN "DROIT D'AUBAINE."*

One of the dark spots in the dark and middle ages is the treatment of foreigners. Was a ship wrecked upon the French coast? What was saved was saved for the seigneur who owned the shore, or his overlord, the king. The lading and the crew were alike his, to dispose of as he would. If the sailors were uncivil enough to set up a claim to the wreckage, he could kill them. If he preferred, he could sell them as slaves. It was his right—the *droit de naufrage*.

On the same principle, down to modern times, if a man happened to die while traveling or living abroad, his estate, in many countries of Europe, was seized and kept by the lord of the manor, or the sovereign of the land. His will was disregarded. His natural heirs, unless born on the soil or naturalized citizens, were set aside. All that he left belonged to the governing power.

Quite naturally, as trade between nations became more considerable, the countries which retained this *droit d'aubaine* in its full vigor and severity, found few merchants ready to bring cargoes to their ports. The result was successive modifications of the system. Certain trading centers were exempted from its operation. Naturalization was to be easily had by traders, and when obtained relieved them from subjection to it. Govern-

* This article is substantially the same as an address delivered by the author, as vice-president of the American Association for the Advancement of Science, and chairman of the Section on Social and Economic Science, at Philadelphia, December 29, 1904.

ment securities held by any foreigners passed to their natural successors or by will.[1]

The interest of the government called for such relaxations of its so-called right, and the king who relaxed it most, because he saw most clearly that it was for his advantage so to do, found the foreign trade of his dominions grow most rapidly, and settle itself upon the most stable footing.

The *droit de naufrage* was the first to disappear. The humaner law of the Christian emperors of Rome,[2] followed by the Visigoths in Spain in the seventh century,[3] and enforced in the twelfth by the laws of Oleron,[4] appealed successfully to the awakening conscience of the modern world.

Anything in the nature of a *droit d'aubaine* had also been denounced in the *Corpus Juris* of Roman law.[5] As time went on its range became more and more contracted, and by the close of the middle ages it had become, so far as personal property was concerned, generally softened in practice to what was called a *jus detractus*,[6] except in case of those dying intestate and without known heirs.

As respects real estate in one country owned by citizens of another, the sovereign of the former might still claim it as his own; but it was because political considerations were deemed to require it. In a nation whose constitution of government or family institutions rest on a landed electorate or aristocracy, it is right to debar foreigners from holding what might enable them to influence directly the conduct of government. This is the defense of the system of escheats under the common law of England, abolished there in 1870,[7] but which still lingers on in many of the United States.

It took the flames of revolution to burn the *droit d'aubaine* out of the institutions of France, and for a time, under Napoleon, it was restored as respects citizens of any nation which yet might retain it.[8]

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1. Merlin, *Répertoire de Jurisprudence*, *Aubaine*, No. VII.

2. Code XI, III, 5, *de naufragiis* 1. Cf. Digest, XLIX, XV, *de captivis et de postliminio*, 5, 2.

3. V. 5, *Corpus Juris Germanici* 2001.

4. Art. 25, 26. 1 Peters' Admiralty Decisions, xli, note.

5. Code VI, LIX, *Communia de Successionibus* 10.

6. Fiore, *Droit International Privé* I, Preliminaries, Ch. II.

7. With a proviso that an alien acquiring land should gain no political rights thereby.

8. Civil Code, Arts. 726, 912; Law of July 14, 1819.

Under the *jus detractus*, the sovereign, within whose dominions a foreigner chanced to die, no longer claimed title to all his goods, unless no will and no next of kin were anywhere to be found.[9] He was content with part, and, after making this "detraction," or, as we would say, "subtraction," gave up the rest to the natural heirs, or those to whom it might have been bequeathed by will.

So if a subject of his own should die, leaving a will in favor of foreigners, or having only foreign heirs, they were admitted to the succession, subject to a detraction of the same kind.

The percentages retained, in either case as time went on, became more and more moderate. Reciprocal conventions between different nations for their regulation in this respect were not uncommon. Five per cent, which was the duty imposed in the first inheritance tax law of Rome—the *vicesima hereditatum et legatorum* decreed by Augustus[10]—became not an unusual rate to fix by such an agreement in the latter half of the eighteenth century.[11]

So far as concerns such a tax on foreigners who come to take away what forms part of the wealth of a nation, it is, if the rate be moderate, in no sense inequitable. But for one sovereign to tax what belongs to the wealth of another bears a different aspect. It is the *droit d'aubaine* in a new dress and a politer form. It even asserts itself over a larger field.

The ancient *droit d'aubaine* was exerted almost exclusively in the case of foreigners dying within the realm; never except over tangible property found within it, belonging to their estates. The modern *droit d'aubaine* fastens upon all their property so found, whether tangible or intangible, and this whether they died within the realm or in their own country, out of which, perhaps, they had never set their feet.

In the first treaty of the United States with a foreign power, its right of detraction, with respect to estate left within its

9. If there be no better claim, that of the sovereign within whose territory property left by the dead is found is clearly good. The leading powers of continental Europe, at their Conference held at the Hague in 1904, agreed (subject to the principle of reciprocity) to the mutual recognition of this right and the denial of any other in the nature of escheat or *aubaine*. *Projet d'un Convention sur les Conflits de lois en matière de succession et de testaments*, Art. II. *Revue de Droit International Privé*, VI, 348. Sixteen European powers and also Japan agreed to and signed this project June 7, 1904.

10. Caracalla doubled the duty, and his successor abolished it. *Heineccius, Antiq. Rom. Syntagma*, I, App. §19.

11. See Merlin, *Répertoire de Jurisprudence, Détraction.*

jurisdiction by an American citizen, was excluded, provided a reciprocal exemption were assured in return. This was that made with France in 1778 (and abrogated by Congress twenty years later), Article XI of which reads thus:

"The subjects and inhabitants of the said United States, or any one of them, shall not be reputed aubains in France, and consequently shall be exempted from the *droit d'aubaine*, or other similar duty, under what name soever. They may by testament, donation, or otherwise, dispose of their goods, movable and immovable, in favor of such persons as to them shall seem good, and their heirs, subjects of the said United States, residing whether in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain letters of naturalization, and without having the effect of this concession contested or impeded under pretext of any rights or prerogative of provinces, cities, or private persons; and the said heirs, whether such by particular title, or *ab intestat*, shall be exempt from all duty called *droit de detraction*, or other duty of the same king, saving nevertheless the local rights or duties, as much and as long as similar ones are not established by the United States, or any of them. The subjects of the Most Christian King shall enjoy on their part, in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article, but it is at the same time agreed that its contents shall not affect the laws made, or that may be made hereafter in France against emigrations which shall remain in all their force and vigour, and the United States on their part, or any of them, shall be at liberty to enact such laws relative to that matter as to them shall seem proper."[12]

Among our subsequent treaties with like or broader provisions may be mentioned those with Sweden of 1783, with Wurtemburg of 1844, with Saxony of 1845,[13] with France of 1853,[14] with Switzerland of 1850, with Honduras of 1864, with Germany of 1876, with Italy of 1878, and with Great Britain of 1900.[15] The exemptions secured by those of the older type related only to property left in or subject to the control of one country by citizens of the other, at the time of their decease. They did not extend to interests of citizens of one in successions to estates of citizens of the other, which are in course of administration in the courts of the latter.[16] The later conventions do extend to these.[17]

12. 2 U. S. Rev. Stat. 206.
13. 2 U. S. Rev. Stat. 723, 809, 690.
14. Comp. of Treaties in Force (1899) 186.
15. 31 U. S. Statutes at Large 1939.
16. *Frederickson v. Louisiana*, 23 Howard's Reports 445.
17. *Geofroy v. Riggs* 133 U. S. Reports 258.

The provision in the Constitution of the United States, securing to the citizens of one State the ordinary privileges common to citizens of any other into which they may go, gives to our people a somewhat similar measure of security. But it has not prevented the building up, slowly at first, rapidly of late, of a net-work of State tax laws, imposing succession duties on property left within the State by deceased citizens of other States, without regard to whether their representatives have already paid similar duties at home, and so are subjected to a double burden for a single privilege.

Within limits, no economist will question the propriety of laying taxes on bequests and inheritances. They are collected with ease and reasonable certainty. They fall upon something which the taxpayer has never yet enjoyed and the diminution of which he therefore does not fully miss. The goose, to follow Colbert's maxim, is plucked so as to get the most feathers with the least squealing, and almost with none. Live goose feathers, indeed, are not required. The real victim is dead.

As to whether the form to be preferred is that of a probate duty, a stamp duty, a tax on the privilege of transmission, or a tax on the privilege of receiving what is transmitted, opinions may fairly differ.

Death duties were first imposed in Great Britain towards the close of the seventeenth century. Under the system developed there the movable property, wherever situated, of a person dying domiciled in the kingdom, is subject to them; but not such property left in the kingdom by one who died domiciled in any other country.[18]

What is taxed is not the interest in property to which some person succeeds because of the death of its former owner, and not property at all, but the interest in property which the former owner lost upon his death, and which would have ceased to exist altogether, had not the State seen fit to prolong it in favor of those whom it recognizes as entitled to the succession.

It is this prolongation or revival of an estate which death has destroyed—a prolongation by force of no natural law, but only of the will of the political sovereign, that justifies a succession tax.[19]

The earliest American succession duties were levied by Con-

18. Wharton's Private International Law, §§ 80, a, 643. As to probate duties, the statutes make a different provision. Fernandes' Executors' Case, 5 Chancery Appeals 314.

19. *Knowlton v. Moore*, 178 U. S. Reports 41, 49. 55.

gress in 1797, and took the form of a stamp tax on receipts for legacies.

Pennsylvania was the first State to impose them. She did this in 1826, but the law did not extend to goods of those not inhabitants of the State, which had been temporarily left there.[20] They were left untouched, in deference to the ancient maxim of private international law, *mobilia personam sequuntur.*

It was this maxim that had always been the chief measure of the jurisdiction of courts over the settlement of the estates of the dead. The estate had been treated as a kind of a survival of the person who once held and administered it. It therefore had its principal seat in the place which had been his home. Transfers of goods *inter vivos*, founded on contract, may be regulated by the law of the place of transfer, but transfers of the whole of a man's goods, upon his death, by force or permission of law, must, in fairness to all concerned, be regulated by the law to which he was subject. In England and America, it is settled that this is the law of his domicil.

Those to whom that law gives them acquire a good title, the world over. There is but one succession to a dead man's goods, and that takes place once for all when he dies and where he dwelt.[21] This law, which protected him while they were his, and directs the course of their devolution, when he is no more, may justly tax those who benefit by their devolution, irrespective of the place of their residence, or of that where the goods may chance to be found.

Our American succession taxes, like those of England, are everywhere, when imposed by the State where the decedent had his home, measured by a percentage of the value of all his goods, wherever situated, and all his real estate situated within the State; subject to some exemption of moderate amount.

But during the last twenty or thirty years the States have begun to go farther and charge a like percentage on all goods of a non-resident, which may be subject to their power.

There is no legal objection to this.

It is not double taxation within the meaning of any constitutional prohibition. In law, double taxation occurs only when the same sovereign taxes the same thing twice. But aside from this, a law of the kind now in question does not tax

20. *Orcutt's Appeal*, 97 Penn. State Reports 179.

21. *Cross v. United States Trust Co.*, 131 N. Y. Reports 330; 30 Northeastern Reporter 125; *Frothingham v. Shaw*, 175 Mass. Reports 59; 55 Northeastern Reporter 623.

the same thing, which had been taxed before. The sovereign of the domicil only can tax the succession to goods, because the succession takes place, once for all, under his laws and in his territory. What the sovereign of the *situs* of goods left by a foreign decedent taxes is not the succession to them, and not the goods themselves, but the privilege of taking them away under the title derived from that succession.[22] The title is unquestionable, and unquestioned, but the right of the owner to avail himself of it in foreign territory depends on the comity of the foreign sovereign who, if he permits a transfer, can prescribe the terms.[23]

Nor is a tax so imposed any infringement of the privileges and immunities of citizens of other States, for they are treated precisely as those of the State by authority of which the tax is laid.

It is an infringement of a maxim of private international law; but such maxims may be set aside by any political sovereign who thinks it for his interest to disregard them. Our courts, in the absence of legislation to the contrary, treat the doctrines of private international law as part of the common or unwritten law; but it is only in the absence of legislation to the contrary. A statute can always abrogate unwritten law.

Not only is it lawful but in many cases it seems not unjust for a sovereign to tax the succession on goods within his dominions, left by a foreigner. If they were not simply in transit, but had been there so long as to become part of the wealth of the realm and to share in the settled protection of the government, they were subject to taxation for it when the owner was alive; and as the new successors must come there for possession, and can only dispossess those in whose hands they may be left by force of this sovereign's laws, and if need be, by process from his courts, they cannot seriously complain if he asserts a right to tax them for what they get.

So is it also in the case of intangible property when that has been long placed by the owner in the hands of agents in a foreign country, to manage and invest.[24]

22. Foelix, *Droit International Privé*, I, 59.

23. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. Reports 283, 288; *Dammert v. Osborn*, 141 N. Y. Reports 564; 35 Northeastern Reporter 407.

24. *New Orleans v. Stempel*, 175 U. S. Reports 309; *In re Lewis' Estate* 203 Penn. State Reports 211; 52 Atlantic Reporter 275; *In re Romaine*, 127 N. Y. Reports 88; 27 Northeastern Reporter 759; 12 Lawyers' Reports Annotated 401,

But while such successions can be taxed by the sovereign of the domicil and taxed again by the sovereign of the *situs*, it is quite another question whether they should be.

Had we adhered inflexibly to the universal maxim of ancient law—*mobilia personam sequuntur*—the results would unquestionably have been far better. Every State laying a succession tax lays as high a one as it deems best to impose. It selects a certain subject for taxation and presumably exacts all that it can fairly be made to yield. For another State to tax the same subject again, therefore, is to impose a heavier burden than it ought to bear.

If the State in which the decedent's estate is settled collected the only duty, and this were the universal principle, nothing in the long run could be lost by any other State. On the average, one would profit as much as another by uniformity of rule. While every State would let the citizens of another withdraw the property of the dead untaxed from its territory, its own citizens, as heirs or legatees, would bring back with equal freedom property of the same kind from all the rest.

As a matter of fact and history our legislatures in this matter have claimed the benefit of the rule *mobilia personam sequuntur* whenever it served their purpose to invoke it, and set it aside whenever it served their purpose to disregard it.

The test of taxability, as respects a succession to intangible property of a non-resident, may be said to be this: Whatever may be its form, if it have a money value and, although it may be fully owned by and fully transferable by the successor, cannot be enforced or converted into money contrary to the will of the person against whom the right of property exists, without coming into the State imposing the tax, then it is property within that State and taxable as such.[25]

If a citizen of Texas die, having money on deposit in a New York bank, a succession tax may be levied on it by New York, as well as by Texas.[26] If he leave bonds in his box in the vaults of a New York safe deposit company, and they are due from a citizen or corporation of New York, both States can exact the same percentage on these. If the bonds are those of a

25. *In re Whiting's Estate*, 150 N. Y. Reports 27; 44 Northeastern Reporter 715; 34 Lawyers' Reports Annotated 322; 55 Am. State Reports 640; *In re Houdayer's Estate*, 150 N. Y. Reports 37; 44 Northeastern Reporter 718; 34 Lawyers' Reports Annotated 235; 55 Am. State Reports 642; *Buck v. Beach*, Indiana Reports; 71 Northeastern Reporter 962.

26. *Blackstone v. Miller*, 188 U. S. Reports 188.

person or corporation of a third State, they may be subject to three taxes. The State where he lived lays a succession tax on their full value because he was subject to its power. The State in which the bonds are deposited for safe keeping lays a tax of the same, or perhaps greater amount, on their full value, because the bonds are in its hands, and it will not let them go without receiving it. The State where the debtor who signed the bonds belongs can also levy as large a tax, because it can refuse any remedy in its courts for their collection except on such terms as it may itself lay down. So in the case of corporation stocks, the shareholder's estate pays one succession tax to the State of which he was a citizen, and those who succeed to him pay another to the State chartering the corporation, and possibly a third to a State in which the stock certificates were kept;[27] for by holding on to them till such tax were paid, it could put a serious obstacle in the way of their sale and transfer.

It is to be remembered also that there is no constitutional limit to the rate of taxation. In Wisconsin, collateral successions falling to the remoter kindred are subject to a deduction in favor of the State of fifteen per cent. In Holland in the eighteenth century thirty per cent was subtracted.[28] Three such taxes would leave of the oyster little but the shell.

In 1898, during the war with Spain, Congress also levied an inheritance tax, and the burden on the succession was heavier still, until the repeal of that measure a few years afterwards. It did not, however, apply to personal property here, passing on the death of the owner to citizens of another country.[29]

The results of this condition of multiple taxation are rapidly becoming apparent.

Capitalists are beginning to center their investments at home. They prefer to put their money in domestic stocks and securities; for these, upon their death, will be taxable but once. They are inquiring in which States, out of their own, it is safest to make or maintain investments; that is, in which States there are either no inheritance-tax laws or no inequitable ones. They are organizing corporations which never die, to hold their property. They are taking title jointly with their wives or children, so that death leaves the survivor the sole owner.

It has been said that a country should never tax anything of

27. *In re Bronson*, 150 N. Y. Reports 1; 44 Northeastern Reporter 707.
28. Adam Smith, Wealth of Nations. III, Book V, 326.
29. *Eidman v. Martinez* 184 U, S. Reports 578.

value which, if not taxed, would be likely to find its way there, and which, if taxed, would be able to escape from its power.[30]

The American people are quick-witted. It will not take long for all of them to learn in which of the States they can and in which they cannot do business without subjecting their property, in case of death, to what is practically double taxation.

Wall Street is to-day the financial center of a great stretch of American territory. The trust companies, the banks, and the safety deposit vaults of New York City hold vast amounts of moneys, bonds and commercial paper belonging to residents of other States, who have left them there for security, or to use them for investment and re-investment. Their owners are taxable on them where they live. Their estates are taxable on them there, if they die. Let those men once fully understand that their estates would be also taxable on them in New York, and it will not be long before their investments take a new shape or are put under different keeping.

An inheritance tax by a State upon what is left by its own inhabitants is right and just. It is right and just to place it upon real estate situated within its territory, and belonging to an estate of a dead man. It may be not unfair and not impolitic to place it upon tangible personal property of such an estate, which has been statedly kept within its territory, and on which no such tax is imposed in the State or country to which its former owner belonged. But to tax it twice; to wring from widow or children or creditors, who have already paid one inheritance tax to the State under whose laws the estate is in course of settlement, another of a like kind, if not unfair, is certainly impolitic. It contravenes the settled conceptions of private international law—conceptions that, through long ages of unbroken tradition, have worked their way into the popular mind, and become identified with those of social justice and economic law.

> "*Ein tiefer Sinn wohnt in den alten Bräuchen.*
> *Mann muss sie ehren.*"

According to these, the succession to a dead man's goods is to be determined by the law either of the country of which he was a citizen or of that—generally the same—in which he had his home; and through that law it is to be worked out to the last detail.

As death comes but once to every man and is the one event

30. See David A. Wells on Taxation, Cyclop. of Political Science, *ad fin.*

on the happening of which the devolution of his estate takes place, so that devolution, to work justice, must, as far, at least, as his personal property may be concerned, follow one single course of law.

During the last few years the principal nations of continental Europe have held four successive conferences at the Hague, to regulate the rights of the citizens of each with respect to acts and transactions that may come under consideration in the courts of the rest. On several points they have reached a definite agreement, in the shape of reciprocal conventions, ratified by the leading powers. A new convention was proposed by the last conference, held in June, 1904, on the subject of succession to the dead. It secures its regulation according to the law of the country of which the former owner was a citizen or subject.

England and the United States have thus far adhered to the view that the law of the land in which he had his home should govern. But under either rule, the same end is secured—unity of administration. A single succession is to be regulated by a single law.

Our new American practice must operate as a divisive force within the American Union. It attacks the prosperity of the country at a vital point. The United States have grown great and rich because of the principle of absolute free trade between the States so far as anything in the nature of a tariff is concerned, and absolute free trade in all respects except so far as Congress may see fit to legislate to the contrary. It was the change to this policy from that of the pre-constitutional era that made the United States a living nationality. Under the Articles of Confederation, each of the thirteen equal sovereigns could tax and often did tax the products of the others. In May, 1784,[31] for instance, Connecticut laid a duty on all goods imported from any other State, except such as had been previously imported from abroad by a citizen of Connecticut for use or sale in Connecticut. This law was expressly made applicable even to the baggage of passengers arriving by water. To such legislation the Constitution of the United States opposed an effective bar, and in so doing benefited every State to the injury of none.

A recent statement from the Bureau of Statistics at Washington shows that the total value of the goods dealt in last year

31. Statutes, Ed. 1784, 271.

throughout the United States in their internal trade, based on what they cost the first consumer, was twenty-two billion dollars. This is nearly fifteen times as great as that of the goods which we export; nearly twice that of all the goods imported during the same year in international trade throughout the world; and more than twice that of the whole world's exports for the same period. Much of this home trade is purely domestic; but much, also, is trade between the States.

Anything which impedes the free transmission of money or moneyed securities from one State to another so far unstrings the sinews of this commerce between the States. To tax their transmission when they pass in a mass, by the event of the owner's death, is to create an impediment to their transmission by him during his life which the public are fast learning to regard as very serious.

This evil first arose during the closing years of the nineteenth century. How shall it be remedied in the twentieth?

Could Congress treat it as so far affecting commerce between the States (and with foreign nations, for the double burden falls often on foreign heirs or legatees) as to justify a statute of the United States providing that such a tax, as regards any one estate or any one item of property belonging to an estate, could be laid but once?[32] If so, it would be to advance the legislative powers of the nation a step farther than they have ever yet gone, and weaken correspondingly the sovereignty of the States. If, on the other hand, Congress has no such power, does it not naturally lead to the conclusion that the States have? Certainly a remedy more in accordance with our constitutional traditions than an Act of Congress would be concerted action to the same end by the States under the principle of reciprocity.

From the beginnings of American history, neighboring English colonies were accustomed, at times, to send delegates to mutual conferences on matters of common interest. When they became States, the same practice was continued. Agreements were made in such conventions while the Articles of Confederation were in force, affecting matters of importance, although some of the statesmen of the day viewed them with disfavor as contrary to the spirit of the confederated government and tending to disintegrate the Union.[33]

32. That it could, would seem to follow from the reasoning of the Court in *Geofroy v. Riggs*, 133 United States Reports 258, 266.

33. Madison's introduction to his Journal of the Federal Convention (Scott's Ed.), 47.

This led to the provision in the Constitution of the United States (Art. I, Sec. 10) that no State should "enter into any Treaty Alliance or Confederation" nor . . . "without the consent of Congress . . . enter into any Agreement or Compact with another State or with a foreign Power."

The courts have construed these provisions so as to make them detract as little as may be from the sovereignty of the States.

Three principles may be considered as settled with regard to them:

1. They do not refer to any agreements not affecting the political relations of a State to another State or to the United States. It was their object to prevent the formation of any combinations of States that might encroach upon the supremacy of the United States.[34]

2. No agreement or compact between States is to be deemed of that nature, unless it is clearly such.[35]

3. Agreements or compacts between States of a political nature, although made without asking or obtaining the consent of Congress, are not invalid if Congress afterwards should ratify them.[36]

In practice, the States from the first have regarded this section of the Constitution as not precluding arrangements and agreements between any of them of a business character, which they might deem of mutual advantage.

They have by concurrent grants of charters similar in form created inter-State corporations, which are as much at home in one State as another, and have, in each, the same powers and rights under the same name and with the same members.[37]

Inter-State Commissions have been constituted by appointments made by neighboring States, to ascertain and mark the boundary between them.[38]

Statutes to promote freedom of intercourse and exchange of business between States, have been passed by one State in

34. *Virginia v. Tennessee*, 148 U. S. Report 503, 519; *Williams v. Bruffy*, 96 U. S. Reports 176.

35. *Baltimore and Ohio R. R, Co. v. Harris*, 12 Wallace's Reports 65, 82.

36. *Green v. Biddle*, 8 Wheaton's Reports 1; Cf. 21 U. S. Statutes at Large 351; *Wharton v. Wise*, 153 U. S. Reports 155.

37. Two Centuries' Growth of American Law 279; *Graham v. Boston, Hartford and Erie R. R. Co.*, 118 U. S. Reports 169, 170; Report of the American Historical Association for 1902, 1, 268.

38. Papers of the New Haven Colony Historical Society, III, 284, 286.

favor of non-residents, conditioned on the existence of like legislation in the State of which they may be citizens.

Since the introduction of automobiles, statutes have been passed in some States requiring them to be registered and numbered, and the number, with the first letter of the name of the State, to be displayed on the vehicle, but with a provision that this shall not apply to automobiles coming into the State from another in which they had been registered and numbered under a similar law, and which make a similar display of the letter and number required there.[39]

Foreign insurance companies are often prohibited by statute from entering a State to do business, unless they fulfill certain prerequisites, with an exception in favor of those coming from a State or country where no such conditions are exacted from companies of the State enacting such statute.[40] So they are often subjected to certain taxes or fees, if and only so long as such taxes or fees are required by the State of their charter from companies created by the State by which the statute is passed.[41]

Reciprocity with reference to foreign countries is also a feature of some of our State statutes for the removal of the common law disability to hold real estate. It is removed as respects citizens of countries imposing no such disability on American citizens who may seek to acquire lands within their jurisdiction.[42] In some of our treaties with foreign powers, the United States agree to urge the adoption of such legislation on the part of the States where it may not already exist.[43]

Statutes have been passed by one State to promote the administration of justice in certain others, or in all others on condition of reciprocal legislation on their part.

Thus, in the first half of the nineteenth century New Hampshire enacted a statute to the effect that if one of her inhabitants were wanted in any other State as a witness for the prosecution in a case of felony, a subpoena requiring him to repair thither to testify at the trial might issue from a New Hampshire court on the request of the judicial authorities of the other State. Proper compensation for the expenses of the journey was to be

39. Public Acts of Connecticut, 1903, 73.

40. See General Statutes of Connecticut, §§ 3508, 3544, 3652.

41. Public Statutes of Rhode Island, Rev. of 1882, p. 396, sec. 23; New York Revised Statutes, 9th Ed., II, 1146.

42. See Texas Civil Statutes, I, Art. 9 (a statute passed in 1854).

43. See our Convention of 1853 with France. 2 U. S. Rev. Stat. 251.

tendered, and if after such tender to the person whose presence was desired, he failed to appear at the trial, he was to be liable to a forfeiture of $300. Maine then adopted a similar statute except that it applied only to prosecutions pending in a New England State. Massachusetts followed in the same line, except that she confined the remedy to neighboring States and to Maine, and in 1902 New York did the same with respect to bordering States, but on condition of the enactment on their part of reciprocal legislation of similar effect. Connecticut and Pennsylvania have since passed laws on this subject of the same general purport.[44]

In some similar way the States of the United States may yet come to a mutual understanding and reciprocal justice become the rule in dealing with successions, whether by will or by inheritance.

A suggestion to that end was made in 1901 by the Buffalo Conference on Taxation. This body, composed of representatives of about thirty States, appointed by their respective Governors, unanimously adopted this resolution:

"Whereas, modern industry has overstepped the bounds of any one State, and commercial interests are no longer confined to merely local interests; and

"Whereas, the problem of just taxation cannot be solved without considering the mutual relations of contiguous States; be it

Resolved, that this Conference recommend to the States the recognition and enforcement of the principles of interstate comity in taxation. These principles require that the same property should not be taxed at the same time by two State jurisdictions, and to this end that if the title deeds or other paper evidences of the ownership of property, or of an interest in property are taxed, they shall be taxed at the *situs* of the property, and not elsewhere. These principles should also be applied to any tax upon the transfer of property in expectation of death, or by will, or under the laws regulating the distribution of property in case of intestacy."[45]

The Massachusetts Tax Commission (of which Professor Taussig of Harvard was a leading member), in 1897 reported a bill to carry out the same principle, though on somewhat different lines.[46]

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44. Public Statutes of New Hampshire, Ed. 1842, p. 382; of Maine, Ed. 1871, p. 876; of Mass., Ed. 1882, p. 986; Public Acts of Connecticut, 1903, 57; General Laws of N. Y., 1902, p. 328.

45. Judson on Taxation, p. 547, note.

46. Report of the Commission, p. 191.

Machinery to facilitate a concert of action for the accomplishment of some such result has for some years been in existence and active operation. This is the annual Conference of Commissioners of States on Uniform Legislation, held in connection with the meetings of the American Bar Associaion, and now representing a large majority of all the States. Its office is to frame and recommend to the States for adoption bills for suitable laws on subjects of common concern which ought to be regulated everywhere in the same way. The result of its labors may be seen in the existence of identical laws in the statute books of a number of States, which have been adopted on its initiative, the most conspicuous instance being that of the Negotiable Instruments Act.

It may well be doubted whether the form of reciprocity recommended by the Buffalo Conference is the best. It is not that naturally suggested by the Anglo-American rules of private international law. These would favor adhesion to the law of the State where the succession occurred—that of the last domicil of the deceased owner. On the other hand, the plan so proposed might be more answerable to the demands of modern society. It would serve to pay for protection to property actually received, in contradistinction from protection theoretically imputed.

But the only question which can be considered within the limits of this paper is the larger one of the possibility and expediency of any reciprocal arrangements looking in this direction.

Could they or could they not be regarded as varying the public relations of the States concerned? Would or would not each stand towards the other in the attitude of a favored nation, since its citizens would be freed from a burden remaining upon those of other States? Is or is not a statutory grant of an exemption from taxation in favor of those belonging to another sovereignty, conditioned on the concession of a similar privilege by the latter to the citizens of the State enacting the first statute, and followed by such a concession, in substance a political compact between the enacting powers?

If there be any such constitutional bar, it could be easily removed.

The arrangement could hardly be deemed to stand on the footing of a treaty, alliance or confederation. If not that, the consent of Congress would avoid any possible objection. There is no reason to doubt that this would be gladly given. Congress

could hardly fail to welcome any proposition from States, looking towards concurrent legislation of the description named. Not only would it remove what is not unlikely to prove a serious impediment to free commercial intercourse between the States, but it would remove it in the interest of fair dealing and equal rights.

It may be suggested that even with the authority of Congress no such exclusive reciprocity could be established between two States, by reason of the further constitutional provision (Art. IV, Sec. 2) that the citizens of each State shall enjoy the privileges and immunities of citizens in the several States.

The purpose of this section, however, is to prevent discrimination by one State against the citizens of another. Can it be said that a statute makes such a discrimination, if it leave them entitled to the same privileges and immunities as those possessed by the citizens of the State making the enactment? The citizens of that State being required to pay a succession tax, can the citizens of another State, coming there to receive an inheritance or bequest, complain if they are subjected to the same burden, even if those of a third State may not be?[47] Is not the discrimination which the Constitution prohibits one in favor of residents against non-residents, rather than one between non-residents, who are citizens of different States?

The Supreme Court of the United States in 1831 had before them a cause which showed the complications as to State sovereignty over dead men's estates, existing even under the established principles of private international law. A citizen of Virginia died in Pennsylvania, leaving personal property in the District of Columbia. A local administrator was appointed in Washington, and the question was whether the local law there or the law of Virginia should govern the distribution of the Washington assets. The Court held that as the District of Columbia had the fund in its power, its law must control its disposition.

"Whether," it added in its opinion, "it would or would not be politic to establish a different rule by a convention of the States, under constitutional sanction, is not a question for our consideration. But such an arrangement could only be carried into effect by a reciprocal relinquishment of the right of granting administration to the country of the domicil of the

47. *Paul v. Virginia*, 8 Wallace's Reports, 168, 180; *Blake v. McClung* 172 U. S. Reports 239, 248, 257.

deceased exclusively, and the mutual concession of the right to the administrator so constituted, to prosecute suits everywhere, in virtue of the power so locally granted him; both of which concessions would most materially interfere with the exercise of sovereign right, as at present generally asserted and exercised."[48]

The convention here suggested, no doubt, was one to be called by Congress, under Article V of the Constitution of the United States, to propose amendments to it. There had then been but one instance of the convocation of any other kind of convention of representatives of States since 1789. That was the Hartford convention of 1814, of delegates from three States, and it had been generally and unsparingly denounced as an unconstitutional assemblage for illegal purposes.[49]

Since that time, however, another of a more imposing character, and equally political in its objects, has been held at Washington—the Peace Convention of 1861—in which twenty-one States participated, and which was officially recognized by the President of the United States. The public were satisfied that this body accomplished a useful work in bridging over the passage of power from one party to another at a time when every day of continued peace was of the highest national importance, and although its right to act or indeed to exist was vigorously denied upon the floor by some of its own members,[50] the verdict of history must be in its favor.

Since then, besides many conferences or conventions from time to time of representatives of States under executive appointment, the national Conference of Commissioners on Uniform Legislation, to which reference has been made, has become a standing institution of unquestioned authority. That authority, indeed, is only to deliberate and to recommend. It makes no agreements between States. But it does initiate action by the States, through which, on some points, they are brought by the legislative action of each into a position of agreement.

Should it be able to agree on the recommendation of a definite, equal and consistent policy as to the subject which has been under our consideration, expressed in the form of an identical statute for general adoption in each of the States which it

48. *Smith, Adm'r, v. Union Bank of Georgetown*, 5 Peters' Reports 518 526.

49. Adams, New England Federalism, 245, 256.

50. Debates and Proceedings of the Peace Convention of 1861, 129, 134, 415.

represents, it is not impossible that, one after another, the States would fall into line and follow the plan proposed.[51]

The tendencies of the time make for such a movement. Individualism and State-isolation are each giving way at every point of material contact to Collectivism. The time-spirit and the world-politics of the twentieth century alike point to reciprocal governmental action on a great scale, for the prevention of international or inter-State complications and collisions, as the true basis of national prosperity.

Simeon E. Baldwin.

51. One State has already made a move in this direction. Connecticut before 1903 laid succession duties on all estates of her citizens, within her jurisdiction. In 1903 she also laid them on all personal property of non-resident decedents, within her jurisdiction, but with a proviso waiving their enforcement as to the latter in case of those residing in a State or country which does not exact such duties upon personal property of Connecticut decedents, within its jurisdiction. Public Acts of 1903, p. 43, sec. 2; Gallup's Appeal, 76 Conn. Reports 627; 57 Atlantic Reporter 699.